

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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**OCT 31 1996**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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In the Matter of )

Implementation of the Local )  
Competition Provisions in the )  
Telecommunications Act of 1996 )  
\_\_\_\_\_ )

CC Docket No. 96-98

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**OPPOSITION TO PETITIONS FOR RECONSIDERATION AND CLARIFICATION**

Time Warner Communications (TW Comm), by its attorneys, pursuant to Section 1.429(f) of the Commission's rules,<sup>1</sup> hereby opposes certain aspects of several of the petitions for reconsideration and/or for clarification submitted in the above-captioned proceeding. Specifically, TW Comm opposes those petitions which ask the Commission to reconsider its decision not to permit states to extend the statutory interconnection obligations of incumbent local exchange carriers (ILECs) to other (non-incumbent) local exchange carriers (LECs).

**INTRODUCTION**

Section 251 of the Communications Act of 1934, as amended,<sup>2</sup> added to the Communications Act by the Telecommunications Act of 1996,<sup>3</sup> entitled "Interconnection," imposes three sets of requirements on three separate categories of telecommunications carriers. Section 251(a) imposes certain duties on all telecommunications carriers; Section 251(b) imposes

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<sup>1</sup>47 C.F.R. § 1.429(f).

<sup>2</sup>47 U.S.C. § 251.

<sup>3</sup>Pub. Law No. 104-104, 110 Stat. 56 (the "1996 Act").

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further obligations on local exchange carriers; and Section 251(c) imposes still additional obligations on incumbent local exchange carriers. Several commenting parties in this proceeding asked the Commission to conclude that states should be allowed to extend to all local exchange carriers the Section 251(c) requirements applicable only to incumbent local exchange carriers. In the First Report and Order issued in this proceeding, the Commission rejected those arguments and concluded that the states were not authorized to extend Section 251(c) ILEC requirements to other LECs.<sup>4</sup> In rejecting assertions of several commenting parties, including several state commissions, that the states should be allowed to extend the Act's ILEC obligations to non-ILECs, the Commission noted that Section 251(h)(2) of the Act establishes a very specific statutory procedure to be followed by parties seeking to have ILEC obligations applied to non-ILECs. Pursuant to that statutory procedure, interested persons, including state commissions, may ask the Commission to treat LECs as ILECs for purposes of the Section 251(c) requirements. The Commission may apply ILEC requirements to other LECs if -- and only if -

- the following conditions are shown to exist:

- (A) Such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1) [*i.e.*, an ILEC];
- (B) Such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and
- (C) Such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.<sup>5</sup>

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<sup>4</sup>Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), FCC 96-325, released August 8, 1996 at ¶¶ 1247-1248 ("First Report and Order").

<sup>5</sup>47 U.S.C. § 251(h)(2)(A - C).

Indeed, the First Report and Order states that the Commission, in addressing Section 251(h)(2) matters, expects to give particular attention to filings of state commissions.<sup>6</sup> Thus, contrary to the assertion of the Public Utilities Commission of Ohio (PUCO), The Commission has not preempted state law.<sup>7</sup> It has carried out the will of Congress as reflected in Section 251(c), and has expressly acknowledged the means contained in the Act for imposing those Section 251(c) requirements on others. Further, it has recognized the important role that the states are to play in that process.

Not satisfied with the Commission's decision not to allow the states to apply the Section 251(c) ILEC requirements on non-incumbent LECs, several state commissions have sought reconsideration of that aspect of the First Report and Order.<sup>8</sup> As will be discussed in this opposition, the Commission's interpretation of the Section 251(c) ILEC requirements and the statutory means for applying those requirements to non-ILECs is correct and should not be reconsidered.

I. State Authority to Extend ILEC Interconnection Obligations to Non-ILECs is not Necessary Either to Ensure Good Faith Negotiations or to Establish Open Markets

PUCO asserts that the Commission's rules dictate an asymmetrical obligation between incumbent and non-incumbent LECs engaged in negotiations or arbitrations regarding interconnection and that they provide an opportunity for new entrants to negotiate with ILECs

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<sup>6</sup>First Report and Order, *supra* at ¶ 1248.

<sup>7</sup>PUCO Petition at 3-4.

<sup>8</sup>See, e.g., The Public Utilities Commission of Ohio's Petition for Reconsideration and Clarification (PUCO Petition) and Petition for Reconsideration of the Public Utility Commission of Texas (Texas PUC Petition).

in "less than good faith."<sup>9</sup> PUCO is wrong in several respects. First, it is not the Commission's rules which dictate different obligations applicable to LECs and ILECs, it is the 1996 Act which creates those different obligations. The regulations codified at Sections 51.100(a)(1) and 51.305(a), noted by PUCO, do nothing more than make the Commission's rules consistent with the differing obligations imposed by Section 251 of the Act on telecommunications carriers, LECs, and ILECs. If PUCO disagrees with those differing obligations, its disagreement is with Congress, not with the Commission, whose rules adopted in the First Report and Order are consistent with the three categories established in Section 251.

Moreover, the Congressional decision to establish certain obligations for all LECs and additional requirements for ILECs is based upon the fact that non-incumbent LECs, in order to become competitors to the ILECs in the provision of local exchange service, will need the ability to access ILEC networks in a manner not needed by the ILECs to access the networks of new entrants. The separate LEC and ILEC requirements have their origins in the House amendments to the 1996 Act. As explained in the Conference Report accompanying the 1996 Act:

Section 242(a)(1) sets out the specific requirements of openness and accessibility that apply to LECs as competitors enter the local market and seek access to, and interconnection with, the incumbent's network facilities.<sup>10</sup>

Neither is PUCO correct when it asserts that imposition of different interconnection requirements upon LECs and ILECs provides an opportunity for new entrants to negotiate in "less than good faith."<sup>11</sup> Not only do the requirements of Section 251(c) and the Commission's

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<sup>9</sup>PUCO Petition at 2.

<sup>10</sup>H.R. Conf Rep. No. 458, 104th Cong., 2d Sess. at 120 (1996) (Conference Report).

<sup>11</sup>PUCO Petition at 2.

rules not create incentives or opportunities for LECs to negotiate in less than good faith, LECs are statutorily prohibited from doing so. Section 251(c)(1) of the Act obligates ILECs and all telecommunications carriers (including LECs) negotiating with ILECs to negotiate in good faith: "The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements."<sup>12</sup> Furthermore, Section 252(b)(5) of the Act states as follows with respect to the obligation of non-incumbent LECs to negotiate in good faith:

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the state commission, shall be considered a failure to negotiate in good faith.<sup>13</sup>

The 1996 Act clearly imposes on all telecommunications carriers participating in interconnection negotiations -- telecommunications carriers, LECs, and ILECs -- a statutory obligation to negotiate in good faith. Thus, there is no basis for extending the ILEC obligations to other LECs in order for those non-incumbent LECs to have an incentive to do that which they are statutorily required to do -- negotiate in good faith.

PUCO further objects that the Commission's decision not to require what PUCO terms a "reciprocal direct interconnection" obligation among all carriers will eliminate an "*open market*" and create a "*one-way market*."<sup>14</sup> PUCO does not define what it means either by "open market" or "one-way market." What is known is that there are profound differences between ILECs and their prospective LEC competitors, and that these differences were

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<sup>12</sup>47 U.S.C. § 251(c)(1).

<sup>13</sup>47 U.S.C. § 252(b)(5).

<sup>14</sup>PUCO Petition at 3 (emphasis original).

recognized by Congress in crafting the 1996 Act and by the Commission in carrying out Congress's mandate in promulgating rules to enable the states to implement the 1996 Act in a nationally-uniform manner.

II. Imposition of ILEC Section 251(c) Requirements  
Upon Others is not Necessary to Ensure  
Compliance with Federal or State Interconnection  
and Resale Requirements

Both PUCO and the Texas PUC seek reconsideration on the basis that application of Section 251(c) obligations to other carriers may be necessary to ensure compliance with other federal and state legal requirements. In this regard, the Texas PUC references two sections of the Texas Public Utility Regulatory Act of 1995 (PURA95).<sup>15</sup> Specifically, PURA95 §3.458 requires all providers of communications service to maintain interoperable networks, and §3.453 requires non-incumbent LECs to permit LECs (including ILECs) to resell existing loop facilities at regularly published rates if the LEC has no loop facilities and has a request for service.<sup>16</sup>

Apparently, the Texas PUC is concerned that it must have the authority to impose the ILEC requirements of Section 251(c) on non-ILECs in order to enforce PURA95 §§ 3.458 and 3.453. That is incorrect. Those provisions of PURA95 are fully consistent with other provisions of the 1996 Act and those provisions of PURA95 may be implemented by the Texas PUC without expanding the scope of Section 251(c). The interoperable networks requirement of § 3.458 is consistent with Section 251(a)(1) of the 1996 Act. That subsection states as follows:

Each telecommunications carrier has the duty to interconnect  
directly or indirectly with the facilities of other telecommunications

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<sup>15</sup>Tex. Rev. Civ. Stat. Ann. art 1446c-0, (Vernon Supp. 1996).

<sup>16</sup>Texas PUC Comments at 14.

carriers;<sup>17</sup>

This general (direct or indirect) interconnection requirement included in the 1996 Act is applicable to all telecommunications carriers, including LECs and ILECs. Therefore, no additional authority is needed to enable the Texas PUC to enforce the interoperable networks requirement of PURA95.

The scope of the non-ILEC resale requirement of PURA95 §3.453 is not entirely clear. If that provision is intended to require the resale of services provided by non-incumbent LECs in Texas, the provision is fully consistent with Section 251(b)(1) of the Act and with the rules promulgated in the First Report and Order. Section 251(b) imposes the following statutory resale obligation upon all LECs:

Each local exchange carrier has the following duties:

(1) Resale. - The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.<sup>18</sup>

Unlike Section 251(c)(4), PURA95 §3.453 does not require LECs to provide services for resale at wholesale rates. Section 3.453 only requires LECs to resell services at "regularly published rates," and then only if the requesting LEC has no loop facilities of its own. Assuming that Texas LECs' offer services at published rates which are not unreasonable or discriminatory, then provision of those services by LECs to other LECs -- including ILECs -- should comply both with Section 251(b)(1) of the 1996 Act and PURA95 §3.453.

If, as implied by the Texas PUC in its petition, PURA95 §3.453 requires non-incumbent LECs to resell unbundled loops rather than the local exchange services that are provided using

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<sup>17</sup>47 U.S.C. § 251(a)(1).

<sup>18</sup>47 U.S.C. § 251(b)(1).

those loops, then PURA95 purports to establish a state requirement upon non-incumbent LECs that is contrary with the obligations of non-ILECs under the Act. The general resale obligation imposed upon all LECs by Section 251(b)(1) on the one hand, and the access to unbundled network elements and resale at wholesale rates requirements imposed only upon ILECs by Section 251(c)(3) and (c)(4), on the other hand, reflect Congressional intent that ILECs bear responsibilities to make their facilities and services available to competitors that are neither necessary nor appropriate to impose on other LECs. Moreover, Congress established one -- and only one -- procedural vehicle for addressing special circumstances where imposition of the access to unbundled network elements and resale at wholesale rate requirements might be appropriately extended to non-ILECs -- the procedures described at Section 251(h)(2). To the extent that PURA95 is inconsistent with the 1996 Act in this respect, then the Commission should confirm that Section 251(h)(2), not PURA95, establishes the only basis for imposition of ILEC requirements upon other LECs.<sup>19</sup>

#### CONCLUSION

The three separate sets of interconnection requirements codified at Sections 251(a), (b), and (c) of the 1996 Act, applicable respectively to telecommunications carriers, LECs, and ILECs, reflects Congress' carefully-designed plan for the opening of local markets to competition by imposing obligations on carriers based upon their relative market power, and the relative need of competitors for access to networks and services. The Commission resolved this

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<sup>19</sup>Similarly, PUCO claims that ILECs should not be denied the right to resell access to the network of a cable company which has entered the local telephone services market. PUCO Petition at 5. Pursuant to Section 251(b)(1), ILECs do enjoy the right to resell LEC telephone services provided by other LECs, including those LECs which provide telephone services over cable networks.



issue properly the first time in promulgating rules consistent with the categories established by Section 251. That aspect of the First Report and Order should be affirmed on reconsideration, and the petitions of PUCO and the Texas PUC requesting reconsideration of that portion of the First Report and Order should be denied for the reasons set forth in this opposition.

Respectfully submitted,

TIME WARNER COMMUNICATIONS HOLDINGS, INC.

A handwritten signature in dark ink, appearing to read "M. F. Brecher", is written over a horizontal line.

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October 31, 1996

## CERTIFICATE OF SERVICE

I, Antoinette R. Mebane, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that a copy of the foregoing "Opposition to Petition for Reconsideration and Clarification" in CC Docket No. 96-98, was served this 31st day of October, 1996, *via hand delivery and via first class mail*, upon the following:

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